No. 90-970

In the Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the owner of a store in a shopping plaza violated Section 8(a)(1) of the National Labor Relations Act by barring nonemployee union personnel from distributing organizational literature to store employees in the plaza's parking lot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 914 F.2d 313. The Board's decision and order (Pet. App. B1-B29) are reported at 295 N.L.R.B. No. 15.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1990. A petition for rehearing was denied on October 25, 1990. Pet. App. C1. The petition for a writ of certiorari was filed on December 17, 1990, and granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

STATEMENT

A. The Underlying Controversy

1. Petitioner operates a number of retail stores that sell "hard" goods, such as televisions, audio equipment, and appliances. One of its stores is located in the Lechmere Shopping Plaza (Plaza) in Newington, Connecticut. Newington is part of the Greater Hartford metropolitan area, which encompasses Newington, Hartford, and New Britain and has approximately 900,000 residents. Petitioner's Newington store (Store) employs about 200 employees, many of whom work part-time. Pet. App. A26, B4-B5, B10, B19; J.A. 17, 114, 116, 76-77, 98-99.

The Plaza occupies a roughly rectangular parcel measuring approximately 880 feet from north to south and 740 feet from east to west. The Store is located at the property's south end. The main parking lot is to the north of the Store. A smaller parking lot, used principally by customers picking up parcels, is to the east of the Store. A strip of 13 smaller "satellite stores" not owned by petitioner runs along the west side of the Plaza, facing the

main parking lot. At the time of the events at issue, four of the satellite stores were open for business. Two public telephones are located in front of the satellite stores. Pet. App. B3, B10-B12; J.A. 72-73, 114-115.

Petitioner owns the property on which the Store is situated and an unrelated enterprise owns the property on which the satellite stores are situated. Ownership of the remainder of the Plaza, including the parking lot, is divided nearly equally between the two. The parking lot contains no lines or barriers to indicate where these ownership interests begin and end. Employees of the Store who drive to work are instructed to park in the northeast corner of the main parking lot. Pet. App. B3, B11-B12; J.A. 20, 66-67, 115, 121.

The Plaza is bounded on the east by the Berlin Turnpike, a four-lane, divided highway with a 50 m.p.h. speed limit, and on the north by Pascone Street. The main entrance to the Plaza is from the Berlin Turnpike; there is no traffic signal or stop sign at this entrance. There is also a narrow delivery entrance from the Turnpike that provides access to a loading dock at the rear of the Store, and an entrance to the Plaza from Pascone Street. Pet. App. B11-B12; J.A. 75-76, 116, 121. A grassy strip about 46 feet wide runs the entire length of the Plaza along the Turnpike, broken only by driveways providing access to the Plaza. Petitioner owns a four-foot-wide portion of the grassy strip abutting its parking lot; the remainder of the strip is public property. Pet. App. B11; J.A. 114-115, 121.

The main entrance has a sign identifying two of the stores on the Plaza, including petitioner's store. There are no signs at the entrances to the parking lot or in the parking lot itself announcing any restriction

on access to, or use of, the parking lot. At each of the entrances to the Store, six-by-eight-inch signs state: "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises." Petitioner has a consistently enforced policy prohibiting nonemployees from soliciting and distributing literature in the Store and on the parking lot. Pet. App. B3-B4, B12-B13; J.A. 59-61, 64, 66, 68, 115-116.

2. On June 16, 1987, Local 919, United Food and Commercial Workers (Union) began an effort to organize the employees at the Store. Initially, it ran several advertisements in the *Hartford Courant*, a general circulation newspaper that serves the Greater Hartford area. The advertisements were addressed to the Store's employees, told of the benefits available with the Union, and included a union authorization card with a caption reading "Mail Today," or "Mail It Now." Petitioner's store manager, Roger Samuelson, removed these advertisements from the copies of the paper received at the Store. Pet. App. B5 & n.9, B13, B18 & n.6; J.A. 96, 119.

On June 18, several Union representatives went to the Plaza's parking lot about 45 minutes before the Store opened for business at 10 a.m. They placed handbills on the windshields of cars parked in the northeast corner of the parking lot, where petitioner's employees had been told to park. The handbills described the advantages of the Union and included a union authorization card with a postage-paid return envelope. Pet. App. B14 n.3; J.A. 21, 135-136. Shortly after the organizers began their handbilling, the Store's assistant manager, Steve Mittler, approached them, told them of petitioner's policy against solicitation and distribution, and instructed them to leave. The organizers did so, and petitioner's security

guards immediately confiscated the handbills. Pet. App. B13-B14; J.A. 18-21, 22-24. Union representatives returned to the Plaza twice that day to distribute handbills. Each time, petitioner's officials told them to leave, and petitioner's security guards confiscated the handbills placed on windshields. Pet. App. B13-B14; J.A. 19-20, 52.

On June 20, four Union representatives entered the Plaza's parking lot and began placing handbills on the windshields of cars parked in the area used by petitioner's employees. Almost immediately, Samuelson asked them to leave. They complied. The Union representatives then decided to attempt to pass out handbills to employees by situating themselves on what they correctly understood to be public property abutting the main entrance to the Plaza. Pet. App. B14-B18, B24-B25; J.A. 25, 35-36. Within about five minutes, Samuelson, Mittler, and three security guards approached the Union representatives and demanded that they leave what Samuelson claimed was petitioner's property. When the representatives refused, Samuelson called the police. Pet. App. B14-B17, B24-B25; J.A. 25, 53, 82, 109-111. When the police arrived, a police officer told the Union representatives that they had the right to remain on the grassy strip as long as they stayed on the portion that was public property adjacent to the Berlin Turnpike. He also warned them to be careful because distributing literature from that vantage point was dangerous due to its proximity to the Turnpike. Pet. App. B14-B15, B24; J.A. 26, 37, 51-52, 53, 83-84.

By standing on the strip of public land adjacent to the parking lot, Union representatives attempted to compile a list of employee names and addresses by recording the license plate numbers of the cars parked

where petitioner's employees were supposed to park. The Union took the numbers to the Connecticut Motor Vehicle Registry, which supplied the names and addresses of the registered owners. Through these efforts, the Union secured the names and addresses of 41 employees, or about one-fifth of petitioner's work force. Pet. App. B5 & n.10, B18-B19; J.A. 37-39, 41, 42-43. The Union sent four mailings of literature to the 41 employees and made about ten home visits. It also attempted to reach the employees by phone, but succeeded in contacting only two employees. Nearly half of the 41 employees had unlisted numbers, and many were high school students whose parents refused to allow the organizers to speak with them. Pet. App. B5 n.10, B18-B19; J.A. 38-39, 46.

B. Proceedings Before The Board

Upon charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by denying the nonemployee union organizers access to the parking lot for the purpose of giving handbills to employees, thereby interfering with the employees' rights under Section 7 of the Act, 29 U.S.C. 157.[1]

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Union has a derivative Section 7 right to communicate with the employees because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Pet. App. B2; J.A. 128-131. The administrative law judge found a violation of Section 8(a)(1), applying the mode of analysis set forth in *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986). Pet. App. B22-B23. The Board, applying the revised analysis in access-to-property cases it announced in *Jean Country*, 291 N.L.R.B. 11 (1988), affirmed the finding of a violation. Pet. App. B1-B7.

In *Jean Country*, the Board reexamined the analytical approach for resolving conflicts between Section 7 rights and property rights in light of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), and its past experience. The Board concluded that "in all access cases" it would balance "the degree of impairment of the Section 7 right if access should be denied * * * against the degree of impairment of the private property right if access should be granted," and that an "especially significant" consideration in this balancing process would be "the availability of reasonably effective alternative means" of communication. *Jean Country*, 291 N.L.R.B. at 14.

Applying the *Jean Country* analysis, the Board stated that the right at issue is the right of the employees to organize, which is "at the very core" of the Act. Pet. App. B4, quoting *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). It added that, since the Union's handbilling occurred in a parking lot and did not impede traffic flow or interfere with the lot's normal use, the handbilling did not "disrupt[]" petitioner's business or significantly "inconvenience[]" its customers. Because neither the handbilling's lo-

cation nor the Union's conduct diminished "the strength of the core Section 7 right asserted," the Board concluded that the Section 7 right should be protected against "substantial impairment." Pet. App. B4.

The Board also observed that petitioner had a "relatively substantial" property interest in its parking lot, but noted that the interest was qualified by the fact that the parking lot was "essentially open to the public." Pet. App. B4. The Board pointed out that petitioner "shares ownership in the parking lot * * * with the operators of a strip of 13 stores," and that the "parking lot is available for use by patrons and employees of all the stores." *Id.* at B3.

The Board then found that there were "no reasonable, effective alternative means available for the Union to communicate its message to [petitioner's] employees." Pet. App. B4. The Board explained that, in the "large 'suburban-urban'" setting of Greater Hartford, the use of mass media—such as newspapers, radio, and television—was "both expensive and ineffective" as a means of communicating with petitioner's 200 employees. *Id.* at B4-B5. The Board also found that, despite the Union's "diligence and perseverance," the "obstacles to comprehensive tallying of [employees'] names and addresses" from license plate numbers of cars parked in the Plaza parking lot were "manifest." *Id.* at B5. The Board further found that the high speed of traffic on the Berlin Turnpike made the adjacent grassy strip of public property "an ineffective and unsafe locale for the union activity." *Id.* at B6.

The Board concluded that the serious impairment of the employees' Section 7 right to organize if union agents were denied access to petitioner's parking lot outweighed the insubstantial impairment of petitioner's property right if access were granted.[2] It therefore found a violation of Section 8(a)(1) of the Act.[3] Pet. App. B6-B7.

C. The Court of Appeals' Decision

The court of appeals enforced the Board's order. After reviewing *NLRB* v. *Babcock & Wilcox Co.*, *supra*, and later decisions of this Court discussing the right of access to private property under Section 7, Pet. App. A10-A12, the court concluded that the Board's *Jean Country* approach to the accommodation of conflicting rights in such cases is a "reasonable interpretation of the Act" that "meld[s] harmoniously with binding precedent." *Id.* at A14. The court specifically rejected petitioner's contention that *Jean Country*'s balancing test conflicts with the general approach delineated in *Babcock* or the specific holding of that case. *Id.* at A12 & n.5, A14, A17-A18.

The court also rejected petitioner's contention that the Board had incorrectly applied the *Jean Country*

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[2] The Board explained that the impairment of petitioner's property interest caused by granting the union access "would not be substantial * * * in light of the unobtrusive manner in which the Union carried out its distribution of leaflets and the fact that [petitioner's] parking lot is essentially open to the public. By contrast, in the absence of a reasonabl[e] alternative means of communication, the Union's Section 7 right would be severely impaired—substantially destroyed within the meaning of *Babcock & Wilcox* without entry into [petitioner's] property." Pet. App. B6 (footnote and internal quotation marks omitted).

[3] The Board also concluded that petitioner violated Section 8(a)(1) of the Act by attempting to eject the organizers from public property abutting its parking lot, and that petitioner's installation of a video camera to monitor exterior areas adjacent to the Store did not violate the Act. Pet. App. B2, B25-B26. Those findings are not at issue here.

principles in this case. Pet. App. A14-A22. The court agreed with the Board that a core Section 7 right was at issue; that the exercise of that right would not interfere with petitioner's business; and that, in the absence of effective alternative means of communication, the Section 7 right at stake would be "substantially destroyed." *Id.* at A15.

Turning to "the crux of the dispute," the court upheld the Board's finding that the Union had no effective alternative means to reach petitioner's "work force with its organizational message." Pet. App. A16, A22. In contrast to *Babcock*, where this Court found reasonable alternatives to exist, the court of appeals noted that, without access to the parking lot, petitioner's employees could not be reached: "employees are not easily accessible or identifiable," the area involved in this case is "much more populous," and the Union's "good-faith effort to explore alternative routes" revealed that other means of communication were ineffective. *Id.* at A17-A18. The court also noted that the use of mass media would be prohibitively expensive, and that, without access, there was no way for the Union to speak with employees in person, which is particularly important in an organizing setting. *Id.* at A19. Moreover, the court noted that the impact on property rights here is much less significant than in *Babcock*. That case involved a claim of access to a private and secluded factory parking lot fenced off from the public; here, the union sought admission to petitioner's publicly accessible parking lot in a way that would be "minimally intrusive." *Id.* at A17, A19. Accordingly, the court upheld the Board's conclusion that the denial of access violated the Act.[4]

[4] One judge dissented, finding this case indistinguishable from *Babcock*. Pet. App. A24-A28. The dissenting judge also took issue with the *Jean Country* test, contending that it slights such alternative methods of communication as newspapers, radio, and television, and that the test equates the employees' lack of response to the union's message with the absence of adequate means for the union to reach employees. *Id.* at A28-A33.

SUMMARY OF ARGUMENT

Relying on the right to organize protected by Section 7 of the National Labor Relations Act, the Union sought access to petitioner's shopping center parking lot to give union literature to petitioner's employees. Relying on its ownership of the parking lot, petitioner denied access. The issue in this case is whether the Board reasonably concluded, under its approach in *Jean Country*, 291 N.L.R.B. 11 (1988), that petitioner's denial of access constituted an unfair labor practice under Section 8(a)(1) of the Act because it "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise" of a core Section 7 right.

A. In *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Court declared that when the exercise of Section 7 rights conflicts with property rights, the Board must reach an "[a]ccommodation" between the two rights "with as little destruction of one as is consistent with the maintenance of the other." Although access is not always required, state-created property rights must yield to Section 7 rights when the persons seeking access have no alternative means effectively to engage in the organizational activity protected by the Act. 351 U.S. at 112-113. In *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976), the Court explained that "[t]he locus of th[e] [*Babcock*] accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and

private property rights asserted in any given context."

The Board's *Jean Country* decision structures the requisite accommodation in the fashion prescribed by this Court's decisions. Under *Jean Country*, the Board considers the degree of impairment of the property right and the Section 7 right that would result from a grant or a denial of access, with particular attention to the issue of whether other means of communication would serve as a reasonable alternative to access. The weighing of those variables accords with the Court's general approach outlined in *Babcock* and *Hudgens*, and fulfills the Board's mandate to ensure that neither Section 7 rights nor property rights are impaired more than necessary.

Contrary to petitioner's assertions, nothing in *Babcock* requires the Board to tilt the scales in favor of property rights, and subjugate Section 7 rights, in all but the most unusual situations. The regime contemplated in *Babcock* is evenhanded: when the federal rights secured by the Act cannot reasonably be effectuated through communication away from the employee's property, access can be required. The Board's approach recognizes the need to exercise judgment about the degree of impairment of conflicting rights that is acceptable in each situation, and its interpretation of the Act is entitled to deference.

B. On a more detailed level, the *Jean Country* formulation is sound in the manner in which it weighs the rights implicated in a particular case and evaluates alternative means. First, the Board need not consider, as a threshold inquiry, whether alternative means are available in the abstract; to do justice to its task of minimizing the impairment of competing interests, the Board must weigh those interests in determining whether an alternative means of communication constitutes a sufficient alternative to access. Second, the Board properly considers it to be a lesser intrusion on property rights to require limited access to open property than to fenced and inaccessible property. Here, petitioner has issued a general invitation to the public to enter its parking lot; the incremental intrusion of allowing the Union access for a finite purpose is not substantial. Third, petitioner is wrong in contending that the Board's determination on the reasonableness of alternatives is influenced by whether employees respond to the Union's message; the Board's concern is that the message "reach" the employees. Fourth, the Board's balancing approach is compatible with predictable outcomes; the process of adjudication is developing general rules to apply in "each generic situation." *Hudgens*, 424 U.S. at 522.

C. Finally, the Board's determination that the Union is entitled to access to petitioner's parking lot should be upheld. The organizational rights at stake are at the core of the Act; the Union's access to the parking lot will cause only minimal impairment to a property right; and, without access, the Section 7 right will be significantly impaired. The alternative means available to the Union to contact employees are newspapers (or other media advertising), collection of license plate numbers to generate a list of employees' names and addresses, and handbilling from a strip of land that is dangerously near to the Turnpike and not immediately accessible to petitioner's parking lot. These flawed options are a far cry from the alternative methods of making contact with employees that were readily available in the small-town setting in *Babcock*; here, the Board found that, with-

out access, petitioner's employees could not realistically be reached. The Board's order, which allows the Union to enter petitioner's parking lot to distribute organizational handbills in a manner that will not interfere with petitioner's business, is a legitimate means to effectuate the rights protected by federal law.

ARGUMENT

A. The Board's Task Under *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), Is To Strike A Reasonable Accommodation Between Property Rights And Section 7 Rights

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. When Section 7 activity is sought to be conducted on an employer's private property, the Section 7 right may collide with the employer's property right. In those cases, it is the responsibility of the Board to strike a reasonable "[a]ccommodation between employees' § 7 rights and [the] employer's property rights." *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976). In *Jean Country*, 291 N.L.R.B. 11 (1988), the Board developed a balancing test to accommodate the respective interests. Petitioner's fundamental submission is that the Board's decision in *Jean Country* conflicts with *Babcock* by failing to give sufficient deference to property rights.

1. *Babcock* was this Court's first encounter with the relationship between property rights and Section 7 rights as exercised by nonemployees. In that case, the Court declared that when the exercise of Section 7 rights conflicts with property rights, the Board must

accommodate the two rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The dispute in *Babcock* arose when a manufacturer barred outside union organizers from distributing handbills in the parking lot of its plant. The plant and the parking lot were closed to the public, surrounded by a fence, and located in a rural area about one mile from a town of 21,000 people. About 40% of the plant's 500 employees lived in the town, while the rest resided within a 30-mile radius. The union had contacted more than 100 of the employees through the mail, and had spoken with other employees on the streets, at their homes, or over the telephone. More than 90% of the employees drove to work, but there was no safe public property near the plant to use in distributing literature to them; accordingly, the organizers sought access to the employer's private parking lot. *Id.* at 106-107. The Board concluded that the employer had committed an unfair labor practice by denying access to its property, without regard to whether the organizers had alternative means to communicate their message.[5] *Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954).

This Court held that the Act required "a distinction between rules of law applicable to employees and

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[5] In *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798-799 (1945), the Court had upheld the Board's rule that *employees* have a Section 7 right to engage in union solicitation on the employer's property, without regard to whether "the plant's physical location ma[kes] solicitation away from company property ineffective to reach prospective union members." See *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 570-571 (1978). In cases preceding its decision in *Babcock*, the Board had extended the rule of *Republic Aviation* to apply to *nonemployees* as well. See *Babcock*, 351 U.S. at 111 & n.4.

those applicable to nonemployees." *Babcock*, 351 U.S. at 113. In nonemployee access cases, "if reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message," an employer may enforce nondiscriminatory rules barring nonemployees from distributing union literature on its property. *Id.* at 112. But

> when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property [is] required to yield to the extent needed to permit communication of information on the right to organize.

Ibid. Applying that test to the facts presented, the Court concluded that the nonemployee organizers were not entitled to access because there were no impediments to effective communication with employees through other channels. The Court emphasized that the employees were concentrated in a "small well-settled communit[y]" and could readily be reached, as the union's efforts had shown, through the mail, contacts on town streets, home visits, and telephone calls. *Id.* at 107 & n.1, 113-114.

In *Hudgens* v. *NLRB*, *supra*, the Court made clear that the balance between property rights and Section 7 rights may vary according to the circumstances. The Court stated that "[t]he locus of th[e] [*Babcock*] accommodation * * * may fall at different points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522. *Hudgens* involved picketing by warehouse workers in support of an economic strike;

the picketing took place at the employer's retail outlet in a shopping center; and the property to which the employees sought access belonged, not to the primary employer, but to another party. *Ibid.* Overruling *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which had required such shopping centers to permit access under First Amendment standards, the Court in *Hudgens* concluded that a claim of access "is dependent exclusively upon the National Labor Relations Act." 424 U.S. at 521.[6] Stating that the distinctions between the facts in *Hudgens* and the situation in *Babcock* "may or may not be relevant in striking the proper balance," the Court remanded to the Board for it to exercise "the primary responsibility for making this accommodation" in "each generic situation." 424 U.S. at 522.

Three principles follow from this Court's decisions in *Babcock* and *Hudgens*. First, in cases where nonemployees seek access to an employer's property, the Act does not authorize unnecessary intrusions on private property; the Board must determine that reasonable alternative means are not available to reach the employees.[7] Second, in making the accommoda-

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[6] Earlier cases had narrowed the First Amendment principle of *Logan Valley* by holding that it did not apply to a union's claim of access to the parking lot of a single retail store, *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972), or to political handbilling that was unrelated to the purposes for which the shopping center property was used, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972).

[7] This proposition follows from both *Babcock* and the logic of the Act: if nonemployees have a reasonable alternative means to communicate with their target audience, an employer's nondiscriminatory denial of access does not violate Section 8(a)(1)'s prohibition against "interfer[ing] with, re-

tion between state-created property interests and Section 7 rights, the Board is empowered to weigh the variables that are typically found in such cases: the nature of the Section 7 right at stake, the nature of the property right, and the impairment of either right that would result from the denial or grant of access. Third, the task of particularizing the governing rules is entrusted to the Board, as the agency with responsibility for implementing national labor policy, subject to judicial review under conventional principles of deference.[8] *Babcock*, 351 U.S. at 111-112; *Hudgens*, 424 U.S. at 522-523.

2. Taking heed of *Babcock* and *Hudgens*, and in light of its experience in applying the Act, the Board developed a general approach to access cases in *Jean*

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strain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights. See also *Jean Country*, 291 N.L.R.B. at 12 ("When individuals seeking to exercise Section 7 rights have reasonable means of exercising them without trespassing, precluding access to the private property in question does not threaten the destruction of the Section 7 rights.").

[8] The Board's explication of the Act is entitled to deference if it is "rational and consistent with the Act." *Litton Financial Printing Division* v. *NLRB*, No. 90-285 (June 13, 1991), slip op. 8, quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990). Contrary to petitioner's contention (Br. 39-47), "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *Ibid.*; *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975); cf. *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1546 (1991) ("The question whether the Board has changed its view about certain issues or certain industries does not undermine the validity of a rule that is based on substantial evidence and supported by a 'reasoned analysis.'").

Country.[9] The Board's approach provides a framework for analyzing the "spectrum" of situations the Board encounters by requiring a careful analysis of the Section 7 right and property right at stake in each case; it also makes the issue of reasonable alternatives a crucial aspect of every decision. The process of analysis under *Jean Country* requires the Board to balance "the degree of impairment of the Section 7 right if access should be denied * * * against the degree of impairment of the private property right if access should be granted." 291 N.L.R.B. at 14. In that balancing process, the "availability of reasonably effective alternative means" is "especially significant."[10] *Ibid.*

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[9] The Board disapproved its decision in *Fairmont Hotel*, 282 N.L.R.B. 139 (1986), which had balanced the strength of the employees' Section 7 right against the strength of the property right involved, with the stronger right prevailing. Only if the rights were deemed relatively equal in strength would the existence of alternative means to exercise the Section 7 right "become [the] determinative" factor. *Id.* at 142.

[10] In *Jean Country*, the Board outlined specific factors that would generally guide its analysis. The degree of impairment of the property right depends on factors such as "the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's size and openness." The degree of impairment of the Section 7 right turns on both the importance of the right in the scheme of the Act and the extent to which it would be frustrated if access were denied. The reasonableness of alternative means of communicating the message is highly relevant to the impairment of Section 7 rights. "Factors that may be relevant to the assessment of alternative means include * * * the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly,

Under *Jean Country*, the Board does not determine whether a particular alternative means of communication is "reasonable" in the abstract; rather, the Board considers it in relation to the impairment of rights that would result if access is granted or denied. The strength and nature of the conflicting "rights will 'inform the analysis of whether a union has reasonable alternative means to reach the targets of its section 7 activity.'" Pet. App. A16, quoting *Laborers Local Union No. 204* v. *NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990). For example, when allowing access will seriously impair the property right, the Board has refused to sanction access even where the Section 7 right is strong and the alternative forms of communication, although available, are limited and burdensome.[11] On the other hand, when

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the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. at 13 (footnote omitted).

[11] For instance, in *Chugach Alaska Fisheries*, 295 N.L.R.B. No. 8 (June 15, 1989), the union sought access for organizational purposes to the nonwork areas of several canneries and to the bunkhouses and campsites owned by the canneries, where many of the employees lived during the short canning season. The Board denied the union access to the nonwork areas of the cannery itself because of the complicated processing operations going on in the facility, which caused public access to be tightly restricted. And, as to the segment of employees who lived in a nearby small town, the Board found that alternative means of communication were adequate because the union had the employees' names and addresses. Only as to bunkhouses and campsites on the employer's property did the Board require access, finding that the employer did not generally restrict access to those areas. Also instructive is *SCNO Barge Lines*, 287 N.L.R.B. 169 (1987), aff'd *sub nom. National Maritime Union* v. *NLRB*, 867 F.2d 767 (2d Cir. 1989), where the Board, applying *Fairmont* but considering

the degree of intrusion on private property is comparatively slight, such as where the property is generally open to the public, the Board has not relegated nonemployees to comparatively ineffective alternative means.[12] Similarly, the relative strength of the Sec-

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alternative means because of the relatively equal competing rights, denied the union access to tow boats for organizational purposes and required contacts on shore, even though reaching the employees on shore was highly burdensome because of the employees' widely dispersed residences. In determining that those means were adequate, the Board noted the employer's strong interest in preventing access to its towboats; *SCNO* thus engaged in the type of balancing process that is now an explicit component of the Board's inquiry under *Jean Country*.

[12] The paradigm situation is where the employer has invited the public to come onto the property "without substantial limitation," as is the case with the common areas of stores clustered together in shopping strips, centers, or malls. See *Fairmont Hotel*, 282 N.L.R.B. at 141-142; *Scott Hudgens*, 230 N.L.R.B. 414, 417-418 (1977) (decision following remand from Supreme Court). In that setting, because the impairment to the property interest of granting access is usually minimal, the balance is more likely to tip in favor of access. Indeed, where access would only minimally intrude on property rights, the Board requires access even for Section 7 rights that are weaker than organizational rights, if the right at issue would be severely impaired without access. See *Sentry Markets*, 296 N.L.R.B. No. 5 (Aug. 10, 1989) (Board granted the union access to the parking lot and sidewalk in front of a food store in a multiple store shopping strip for the distribution of handbills urging customers not to purchase a struck product; the union's boycott message was a complex, "detailed" one that "could not be fully contained on * * * picket signs" on the public property), enforced, 914 F.2d 113 (7th Cir. 1990); *Jean Country*, *supra* (Board granted union access to picket and handbill in a common area in front of a nonunion store in a large shopping mall when union's purpose was to encourage consumers to shop at other, unionized stores

tion 7 right at issue is considered in determining the extent to which exclusive use of alternative means of communication will compromise rights protected by the Act.[13]

3. Petitioner's principal contention (Pet. Br. 20) is that *Babcock* expresses a preference "to leave intact the usual private property rights, except where unusual circumstances require[] trespassing," such that the balance struck by the Board in each case "must be skewed in favor of private property rights." But the "guiding principle" of *Babcock* is the requirement that private property rights and Section 7 rights be accommodated with as little infringement of one as is compatible with protection of the other. *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 548 (1972); *Hudgens*, 424 U.S. at 522 & n.12. Con-

in the mall; union activity at more remote locations would be ineffective and might discourage shoppers from patronizing any similar store at the mall).

[13] Accounting for the strength of the Section 7 right at issue assists in resolving the "anomaly" noted in *Giant Food Markets* v. *NLRB*, 633 F.2d 18, 24 (6th Cir. 1980): if access rulings are based on the presence or absence of alternative means without regard for the strength of the Section 7 right at issue, it "could result in allowing access for the exercise of core Section 7 rights, such as employee organizing, less readily than for less central rights, such as area standards activity." *Jean Country*, 291 N.L.R.B. at 12. "This is so because the intended audience of an organizing campaign—the employees of a particular employer—is more readily identifiable and thus more easily reachable away from the property than is the intended audience of area standards publicity"—customers of the employer or its products. *Ibid.* Weighing the right in question ensures that area standards picketing (for example) does not too easily override property rights; for the same reason, the Board does not let the union's definition of its intended audience control the analysis. *Id.* at 12-13.

trary to petitioner's view, *Babcock* did not announce a static test that applies mechanically in all settings. Rather, its accommodation principle, as explicated in *Hudgens*, requires a careful weighing of the interests implicated in particular settings where nonemployees claim a need for access. Cf. *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 492 (1978). If petitioner's across-the-board presumption in favor of property rights were accepted, the careful scheme of accommodation envisioned by *Babcock* would be upset. Indeed, it would require the subordination of core Section 7 rights to the property interests of employers even when the impairment of those property rights through temporary access would be no more than de minimis—as is the case here with respect to petitioner's parking lot.

Nor does *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), require the Board to tip the balance in favor of property rights, as petitioner argues. See Pet. Br. 18, 20, 39, 47. *Sears* presented a preemption issue: whether the Act preempts a state trespass action against a union that is picketing on an employer's property. The Court held that when the union has not filed an unfair labor practice charge—and the employer thus has no means of obtaining the Board's decision whether the picketing is protected by the Act—the state court action may proceed.[14] Petitioner reads far too much into the statement in *Sears* that "experience under the

[14] The state court, however, must determine whether the trespass in question is protected by Section 7. 436 U.S. at 201 ("Prior to granting any relief from the Union's continuing trespass, the state court was obligated to decide that the trespass was not actually protected by federal law.").

Act teaches" that "a trespass is far more likely to be unprotected than protected," and that the employer's right to exclude "remains the general rule." 436 U.S. at 205. The Court's observation reflected a description of then-existing case law, not of any particular mode of analysis applied by the Board.[15] The Court acknowledged that the proper accommodation of rights takes into account the strength of the Section 7 right and the property right being asserted, see 436 U.S. at 204 (citing *Hudgens*), and specifically noted that organizational rights lying "at the very core" of the Act would presumably get greater deference "in the *Babcock* accommodation analysis" than more peripheral Section 7 rights. 436 U.S. at 206 & n.42. In sum, *Sears* did not change the Board's mission under *Babcock* and *Hudgens* to accommodate the two competing rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112.

B. The Approach Set Out In *Jean Country* Reasonably Fulfills The Board's Charge To Accommodate Competing Interests

Apart from its broad submission that *Jean Country* undervalues property rights, petitioner also challenges the elements of the Jean Country analysis, contending that the Board errs in the way it analyzes the char-

[15] Moreover, the law in this area was not particularly well developed at that time. As Justice Blackmun noted in his concurrence, "for a number of years, the First Amendment holding of *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1986), overruled in *Hudgens* v. *NLRB*, diverted the Board from any need to consider trespassory picketing under the statutory test of *Babcock*." Accordingly, he stated, "it would be unwise to hold the Board confined to its earliest experience in administering the test." *Sears*, 436 U.S. at 211.

acter of the rights implicated in a particular case, and in evaluating the adequacy of alternative means. Those contentions are not well founded.

1. *The adequacy of alternative means cannot be analyzed in isolation from other factors.* Petitioner and its amici argue that the Board must, as a threshold matter, determine whether the union has some alternative means to trespassory communication; only if the intended audience is "inaccessible to normal means of contact" may the Board look to the importance of the rights at issue. Pet. Br. 47; Amici Chamber of Commerce, *et al.*, Br. 9-12.[16] That suggestion is flawed. The *Jean Country* approach recognizes, of course, that when access is unnecessary to provide a reasonable means of reaching the union's target audience, the union's request may be denied. Indeed, access may be denied even where the impairment of property rights is slight and the use of the employer's property would make the union's communication marginally more effective.[17] But a

[16] Citing the Court's statement in *Babcock* that an employer does not have to "permit the use of its facilities for organization when other means are *readily available*," 351 U.S. at 114 (emphasis added), the Chamber asserts that "[a]bsent proof that other means are *nonexistent*, the Board's inquiry is terminated." Amici Br. 10 (emphasis added). But the Court's description—means that are not "readily available"—is not synonymous with the Chamber's—means that are "nonexistent." If the Chamber's extreme position were accepted, an employer could routinely defeat a claim to access by asserting that a "usual" means of communication was theoretically available, no matter how inadequate that means might be for the enjoyment of Section 7 rights in a particular setting.

[17] For instance, in *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), slip op. 6-7, aff'd *sub nom. Laborers' Local Union No. 204* v. *NLRB*, 904 F.2d 715 (D.C. Cir. 1990), the union sought access to the parking lots of three of the

rigid direction to rate the adequacy of alternative means without regard to the particular property right and Section 7 right ignores the Board's obligation to balance the relative harms. *Babcock*, 351 U.S. at 112. To achieve an accommodation of rights that does not harm either right more than necessary, the Board must examine the alternatives to trespassory communication in context. For example, if a particular alternative means is so burdensome or expensive that it is unlikely to be employed to "reach" the target audience with the union's message, Section 7 rights will plainly suffer. The Board must then decide *how much* those rights should suffer before an employer will have "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. 158(a)(1). It cannot make that judgment without considering the importance of the right to the purposes of the Act.

The adequacy of mass media as an alternative to access illustrates the point. As the Board stated in *Jean Country*, "generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact."

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employer's restaurants to handbill about its area standards dispute with a contractor doing construction work for the employer at a fourth restaurant. Slip op. 2, 4. Noting that the union had access to an area in which it could effectively handbill at the fourth restaurant, the Board found that the union had "reasonable means of exercising Section 7 rights on behalf of employees whose wage standards the [contractor] allegedly was undermining" and, thus, it was unnecessary to grant the union access to the parking lots of the other three restaurants. Slip op. 5-6. Accord *Richway Div. of Federated Dep't Stores*, 294 N.L.R.B. No. 49 (May 31, 1989).

291 N.L.R.B. at 13.[18] The court of appeals explained why those means are usually deficient: it is "unrealistic to divorce considerations of cost from the calculus of alternative means." Pet. App. A20. For example, in an organizing campaign, a union could theoretically buy television, radio, or newspaper advertisements sufficient "to saturate a market and thus convey its * * * message," but in the typical case it is "unreasonable to expect the union to embrace this extreme." *Ibid.* Mass media advertising "is expensive and, when addressed to a work force which comprises a tiny fraction of the viewing audience, extravagantly wasteful." *Ibid.* See *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967); *NLRB* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963), cert. denied, 376 U.S. 951 (1964). On the other hand, if a union is aiming its message at consumers of a widely used and readily identifiable product to publicize its dispute with the manufacturer and to urge a boycott, mass media advertising, even though expensive, may sometimes be an appropriate alternative to access. See *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62 (Aug. 31, 1989); cf. *Sentry Markets*, 296 N.L.R.B. No. 5 (Aug. 10, 1989) (alternative means were not effective where product was not readily identifiable), enforced, 914 F.2d 113 (7th Cir. 1990). Accordingly, the Board's consideration of the right in question as it bears on the reasonableness of a particular alternative is a sensible way to further the accommodation required by *Babcock*.

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[18] Nothing in *Babcock* requires the use of mass media; the alternative means of communication discussed in that case were "personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." 351 U.S. at 111; *id.* at 107 n.1.

2. *The openness of the property is a relevant consideration.* Petitioner also contends (Pet. Br. 21-22; see also Amicus International Council of Shopping Centers, Inc., Br. 5-10) that under *Jean Country* the Board improperly calibrates property rights by allowing an owner's invitation to the public to transact business on its property to dilute its right to exclude. But it is entirely rational for the Board to find that the impairment of a property right is far more significant where the employer must grant access to a fenced, privately maintained location from which the public is excluded (the *Babcock* situation), as opposed to an open parking lot where the public is invited, and encouraged, to come (the situation here). Barring the general public by putting up a fence generally signals that security concerns or the particular demands of the business require a heightened level of exclusivity, and that access by outsiders may impair the employer's objectives. In contrast, an employer that opens its property to the public manifests less concern that the presence of outsiders would impair the normal use of the property.

By considering the uses to which an employer's property is already put, the Board is able to evaluate the "incremental intrusion" [19] that access would have on the property right. See *Montgomery Ward & Co.* v. *NLRB*, 728 F.2d 389, 391 (6th Cir. 1984) (per curiam) (union officials were entitled to access to a snack bar to solicit employees where the activity was "consistent with" and an "incident to" the "normal use of [the] facilities"). As a practical matter,

[19] Cf. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 575 (1978) (considering that factor in upholding employees' distribution of contested portions of a union newsletter on employer's property).

the impairment is modest when union agents enter a large parking lot in a shopping center for a limited time and purpose. The interference with property interests is particularly attenuated given the Board's customary restriction that access not impede the normal use of the property.[20]

Contrary to the suggestion of petitioner (Pet. Br. 22) and Amici Chamber of Commerce, *et al.* (Br. 14-15), the Board's consideration of the character of the property does not resurrect the discredited First Amendment analysis of *Logan Valley*, which this Court overruled in *Hudgens*. See note 6, *supra*. Although *Hudgens* makes clear that a shopping center's openness to the public does not mean that it is public property for purposes of the First Amendment, nothing in *Hudgens* suggests that the openness of the property is irrelevant in the statutory analysis under the Act. Indeed, in inviting the Board to consider the character and strength of both property rights and Section 7 rights, 424 U.S. at 521-522, the Court necessarily contemplated that the Board would consider factors that diminished the force of the employer's reliance on its property interests. And Amici Chamber of Commerce, *et al.* are far from the mark in suggesting (Br. 15 & n.17) that compelled access to an employer's property implicates First Amendment and due process concerns, so that the Act should be construed to allow access "only in truly exceptional circumstances" in order to avoid a serious constitutional question. The constitution-

[20] Here, for example, the Board's order authorized access to petitioner's parking lot "as long as the [distribution of union literature] is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike." Pet. App. B27.

ality of the Board's practice here is settled under *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), where this Court rejected a First and Fifth Amendment challenge to a state requirement that a shopping center allow access to individuals for the purpose of exercising free speech rights.

3. *The Board does not require that the alternative means be persuasive to employees.* Petitioner also contends (Pet. Br. 21, 23-25) that Jean Country misapplies the alternative-means requirement of *Babcock* by focusing on the union's success in using nontrespassory alternatives rather than on whether the union can "reach" its intended audience with those alternatives. But the Board does not base its access determinations on whether the employees are receptive to the union's message; rather, the Board focuses on whether there is a reasonable means for the union to convey its message in a way the target audience can understand. In context, the statement in *Jean Country*, 291 N.L.R.B. at 13, that the Board would consider the extent to which "exclusive use of nontrespassory alternatives would dilute the effectiveness of the message" does not imply, as petitioner suggests, that the Board looks to the persuasiveness of the message. Rather, the statement merely reflects the truism that communications that are unlikely to be heard or understood by a large part of the intended audience are necessarily diluted in their effectiveness.

The Board's approach is also consistent with *Babcock*, which requires the Board to consider not only whether alternative means are available, but also whether they are "ineffective." 351 U.S. at 112-113. The Board has recognized that alternative means must be used even if they are not as effective as access; as petitioner and its amici note (Pet. Br. 21-22; Chamber

of Commerce, *et al.*, Br. 13), *Babcock* rejected the contention that union organizers must have access to property because the workplace is "so much more effective" a place for communication than alternatives such as personal contacts on public property or in the employees' homes, telephone calls, letters, or meetings. 351 U.S. at 107-108, 111. See *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), slip op. 6. But that does not mean that the Board must totally disregard the effectiveness of the available alternatives.

4. *The Board's approach provides sufficient predictability.* Finally, petitioner contends (Pet. Br. 13, 19-20; see Amici Chamber of Commerce, *et al.*, Br. 20-22) that the Board's use of a balancing test in which neither right has presumptive primacy creates an "unpredictable" situation in which property owners have no real sense of when access may be denied and when it must be granted. Although any balancing test will lack the predictability of a bright-line rule, the Court concluded in *Babcock* and *Hudgens* that the importance of the two rights in question—and the need to prevent unnecessary damage to either—made a careful balancing analysis essential. And, as experience under the *Jean Country* approach develops, recurring "patterns will become more clear," *Jean Country*, 291 N.L.R.B. at 14, making it possible for the parties to discern when access would likely be permitted in "each generic situation." *Hudgens*, 424 U.S. at 522. Indeed, the outline of these patterns is beginning to emerge in the Board's cases. See notes 11-13, *supra*.[21]

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[21] As the process of case-by-case adjudication continues, it will also become easier for the Board's General Counsel expeditiously to determine whether a charge of denial of access

Ironically, petitioner also complains about the emergence of patterns (Pet. Br. 34-35 & n.9); it asserts that, because the Board has denied access to property in relatively few cases since *Jean Country*, the Board must be failing "to give sufficient deference to property rights, or * * * to require a true showing of the necessity for trespass." [22] But the majority of the cases in which the Board has granted access involve a generic situation similar to that found here—access to retail property that is generally open to the public, where the Section 7 right would be substantially impaired if access to the property were denied.[23] There is no flaw in an administrative process that reaches consistent results on comparable records.

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lacks merit and should be dismissed. Accordingly, contrary to the contention of amici (Chamber of Commerce, *et al.*, Br. 2-22 & n.23), the use of the *Jean Country* balancing test does not mean that every charge will have to be subjected to a fact-specific hearing while employers are required to tolerate unwelcome trespasses.

[22] In noting a trend in favor of access, petitioner overlooks the fact that, as this Court observed in *Sears*, 436 U.S. at 206-207, unions may invoke the Board's jurisdiction when their access claim is strong, but avoid it when their access claim is weak. Weak cases are also weeded out by the General Counsel, who has "unreviewable discretion" not to file a complaint on a union's charge, see *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 126 (1987).

[23] See, *e.g.*, cases cited in note 12, *supra*. In three other cases, the Board required contractors to grant access to union representatives to handle grievances involving a subcontractor's employees, where the subcontractor had a union-access clause in its collective-bargaining agreement with the union. See *C.E. Wylie Construction Co.*, 295 N.L.R.B. No. 119 (July 31, 1989), enforced, No. 90-70033 (9th Cir. June 3, 1991); *Mayer Group*, 296 N.L.R.B. No. 9 (Aug. 9, 1989); *Subbiondo & Associates*, 295 N.L.R.B. No. 132 (July 31, 1989). In the

C. The Board Properly Determined That The Union Must Be Allowed Access To Petitioner's Parking Lot

The Board's application of the *Jean Country* analysis in this case fully accords with this Court's decisions and the policy of the Act. Petitioner errs in contending (Pet. Br. 23-38) that *Jean Country* in general and this case in particular reflect an improper reduction in the General Counsel's burden to establish the need for access to property.

1. *The Union's handbilling was in furtherance of a core Section 7 right.* The Union sought to distribute handbills to petitioner's employees in furtherance of an organizing effort. The handbills described the benefits offered by the Union, and included authorization cards to facilitate the expression of interest by employees in being represented by the Union. Petitioner's denial of access therefore implicates the organizational rights of its employees, which are at the "very core" of the interests the National Labor Relations Act seeks to protect. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). As this Court has held, an essential derivative of the right of employees to engage effectively in self-organization is the right to receive information from union organizers, because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 113 (1956); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542

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two cases that involved access for union organizers to residential, nonwork areas of remote industrial facilities, access was granted in one, *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125 (May 12, 1989), and access was granted in part in the other, *Chugach Alaska Fisheries*, 295 N.L.R.B. No. 8 (June 15, 1989).

(1972). Nothing about the situs or manner of the Union's handbilling diminished the strength of this statutory right; the Union's handbilling was unobtrusive and was compatible with the parking lot's normal use.[24] Pet. App. B4, B6.

2. *Petitioner's parking lot was open to the public and the handbilling did not impair its normal use.* Petitioner's parking lot is not a private space from which nonemployees are normally excluded; no restrictions are posted at the entrances to the Plaza or in the parking lot itself. Rather, the parking lot is open and freely accessible to the public from public streets. Nor is the lot reserved for petitioner's exclusive use. Both the lot and its principal entrances are likely to be used "by patrons and employees of all the stores" in the Plaza, or by persons using the public pay telephones. Pet. App. A2-A3, B3, B11-B12. The Store was located in a plaza presumably to take advantage of cross-over shopping—a phenomenon that occurs when customers come to shop at one store, but impulsively decide to shop at a different store. See *Scott Hudgens*, 230 N.L.R.B. 414, 417-418 (1977) (cross-over shopping is "explicitly recognized" in the design of multistore shopping areas). Thus, it was integral to petitioner's plan for the parking lot that it be essentially open to the public.

[24] Making liberal reference to matters that were excluded from evidence, petitioner argues (Br. 11-12, 35-38) that the Union's entry into the Store itself was an abusive practice that undermines the Section 7 right asserted in this case. Cf. *NLRB* v. *City Disposal System, Inc.*, 465 U.S. 822, 837 (1984). But as the court of appeals concluded, the Board reasonably rejected petitioner's offer of proof on that subject on relevancy grounds. Pet. App. A15 n.8, B4 n.7. Assuming, as petitioner contends, that Union representatives had no right to enter the inside of the Store, the circumstance is irrelevant to petitioner's refusal to permit unobtrusive access to the parking lot.

Petitioner did enforce a policy against soliciting and distributing literature on its property, presumably to avoid disturbances to its customers or potential liability. See J.A. 70, 89-90. But as the court of appeals pointed out, the Board found that the "planned organizational activity did not interfere with normal use of the [parking lot], disrupt Lechmere's business, constitute harassment, or impede traffic flow." Pet. App. A15, B4. In light of that finding, petitioner never explains what concrete impairment of its property interest is implicated here that trumps the organizational rights protected by federal law.[25] Accordingly, temporary access by Union personnel would not impair in any significant way the uses and purposes to which petitioner put its property.[26]

3. *Handbilling on the parking lot was the only reasonable means for the union to reach petitioner's employees with its organizational message.* Finally, the

[25] Petitioner's reliance on its property rights to exclude Union organizers serves to impede the Union's communications with the employees about organizational rights, but if that is petitioner's purpose, cf. J.A. 91, 95 (petitioner preferred that its employees not be represented by a union), it is not a legitimate objective under the Act. See 29 U.S.C. 151 (declaring that it is the policy of the United States to "encourag[e] the practice and procedure of collective bargaining and [to] * * * protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing").

[26] Because the Board found that access would not interfere with petitioner's business, petitioner is wrong in contending (Pet. Br. 47) that the decision here is inconsistent with *Tecumseh Foodland*, 294 N.L.R.B. No. 37 (May 31, 1989) (access denied where number and placement of the union's handbillers on narrow walk in front of the store was "obtrusive" and would obstruct entry and exit from the employer's premises).

Board reasonably concluded that the General Counsel met his burden of proving that "there was no reasonable, effective alternative" means of communication to the distribution of handbills on the Plaza parking lot. Pet. App. B4.

a. Under *Babcock*, the General Counsel has the burden to show that, in the absence of access, there are no reasonable means of communicating the union's message to the employees. 351 U.S. at 113; *Sears*, 436 U.S. at 205. Petitioner contends (Br. 25-31) that because *Babcock* imposes the burden of proof on the General Counsel, the Board may not rely on presumptions or inferences in finding that a given alternative is unreasonable. Instead, petitioner argues, the Board must insist that the General Counsel show that the union tried and failed to communicate with employees through the proffered alternative.

The decision in *Babcock* does not question the authority of the Board, like any administrative agency, to draw reasonable inferences from the evidentiary facts, *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 800 (1945), or to formulate generally applicable inferences or presumptions based on its "[c]umulative experience." See *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Nor need the union waste its time and money to engage in pro forma efforts to communicate through plainly inadequate means. Where the Board finds it clear from experience that a given alternative is not effective, it can so rule. On the other hand, "[i]n some contexts, the attempt must in fact have been made to support an objective conclusion that an asserted alternative is not reasonable." *Jean Country*, 291 N.L.R.B. at 13. A universal requirement that the alternative must be tried would "create[]" unnecessary "delay and additional expense for the union" and would "force[] the union to undertake futile efforts in order to secure a favorable Board determination." *Husky Oil, N.P.R. Operations, Inc.* v. *NLRB*, 669 F.2d 643, 645 (10th Cir. 1982); *Belcher Towing Co.* v. *NLRB*, 614 F.2d 88, 91 (5th Cir. 1980); *National Maritime Union* v. *NLRB*, 867 F.2d 767, 771 (2d Cir. 1989).

b. The Board reasonably concluded that a newspaper or other mass media campaign was not a reasonable way for the Union to reach petitioner's 200 Newington store employees. As noted (pp. 26-27, *supra*), the Board considers newspapers or other mass media to be, as a general matter, too costly and indirect to serve as an effective substitute for face-to-face contacts. The Board is entitled to deference with respect to that presumption, which is based on its experience in labor cases. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953). Nothing in this case required the Board to depart from it.[27]

As the Board found, a mass media campaign would have been a particularly inefficient and costly method for the Union to disseminate its organizational message. Pet. App. A20. First, newspapers are not an effective way to reach 200 employees in a metropolitan area of about 900,000 people; it is a hit-or-miss proposition whether any employees subscribe to

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[27] Petitioner's reliance (Pet. Br. 30, 46) on *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62 (Aug. 31, 1989), is misplaced. There, the Board found that the union's use of 160 brief advertising spots on local television and radio, together with consumer "picketing and handbilling at the perimeters of the stores," constituted reasonably effective alternative means for conveying the union's area standards message. Here, by contrast, the audience was not the buying public as a whole, but a small group of employees who might never receive a mass media message and who could not be reached from nearby public property.

the local newspaper,[28] or whether they would see the Union's advertisement.[29] *Id.* at B5 ("A newspaper's general circulation * * * is not evidence of receipt of a discrete message intended for a specific audience * * * of * * employees [who] may never receive, purchase, or read the[] local newspapers, or may be exposed to them only occasionally."). Second, advertising on media such as television and radio is too limited in content; the typical television "sound bite," for example, could not provide employees with the basis for making an informed choice about whether to join a union. Cf. *NLRB* v. *United Aircraft Corp.*, 324 F.2d at 130. Third, an organizing campaign is particularly dependent on personal conversations in which employees can raise questions and be encouraged to overcome any concerns they might harbor about management's possible disapproval of union activity. Mass media advertising is not an adequate

[28] Petitioner contends (Pet. Br. 29-30) that because the Union ran some advertisements, it must have viewed them as an effective alternative means. But that argument comes with poor grace from petitioner, which succeeded in excluding, as irrelevant, testimony at the administrative hearing from a union agent about the Union's basis for concluding that media advertising was an ineffective means of communicating its organizational message (Tr. 120). In any event, the Union's conduct may be explained by the fact that when the advertisements were run, the rule in the Second Circuit (where the instant case arose) seemed to be that "to sustain its burden of proving lack of alternative means [in access-to-property cases], a union [had to] demonstrate that it unsuccessfully attempted to utilize other means." *National Maritime Union* v. *NLRB*, 867 F.2d 767, 771 n.3 (2d Cir. 1989).

[29] Petitioner's practice of removing the advertisements from the newspapers delivered to the store, Pet. App. B5 n.9, also vitiated the effectiveness of that medium of communication.

substitute for such contact. *Husky Oil*, 669 F.2d at 646.

c. The Board also concluded that even with "diligence and perseverance," the Union would not be able to compile a comprehensive list of the names and addresses of petitioner's employees, and thereby meet with them face-to-face away from the workplace. Pet. App. B5. For several months, union representatives regularly went to public property abutting the Plaza between 9 and 10 a.m. to copy the license numbers of cars parked where petitioner's employees were encouraged to park, and took the license numbers to the Motor Vehicle Registry, which supplied the names and addresses of the cars' registered owners. Nonetheless, the Union secured the names and addresses of only one-fifth of petitioner's employees. Pet. App. B5 & n.10, B18-B19; J.A. 37-43. Those modest results are hardly surprising, given that "[e]mployees may use cars that are not registered in their names, may car pool together, may use alternative means of transportation, * * * may park elsewhere [or may be] part-time employees [who] might not use the parking lot at those times shortly before and after the [S]tore's designated opening hours." Pet. App. B5-B6. The obvious inefficiency of that process contributed to the Board's finding that copying license plate numbers was not an effective source of names and addresses of petitioner's employees. *Id.* at B6.

Even as to those few employees whose names and addresses the Union was able to obtain, face-to-face contact was difficult to arrange. The Union secured the names and addresses of 41 employees, but nearly half of those individuals had unlisted telephone numbers. The Union therefore had no way to request even a brief meeting with them. Moreover, the Union

was able to make a completed phone call to only 10 of the 20 employees for whom it had a telephone number, and in eight of those 10 instances, the Union agent was rebuffed by a teenage employee's parent, who refused to allow the teenager to speak with a union organizer. Pet. App. A6, B5 & n.10; J.A. 46-47. On the whole, the collection of license plate numbers did not give the Union a "meaningful opportunit[y] for face-to-face contact" with the vast majority of the Store's 200 employees.[30] Pet. App. A18-A19. See *National Maritime Union* v. *NLRB*, 867 F.2d at 773; *John Bancroft & Sons*, 140 N.L.R.B. 1288, 1291 (1963).

d. The Board was also justified in finding that the remaining alternative means of communication for the Union—to position its agents on the strip of public property abutting the Turnpike in an attempt to distribute handbills to employees as they arrived for work in their cars—"offer[red] an ineffective and unsafe locale for [such] union activity." Pet. App. B6; see *id.* at A18 & n.11. Union agents were specifically warned by the police that the grassy strip was not a safe place to stand because of the flow of traffic entering the parking lot from the Berlin Turnpike. Moreover, the lack of a traffic signal or stop sign at the main entrance not only created a safety hazard for the union organizers, but also invited accidents if the organizers tried to approach moving cars to give the occupants handbills. See *W.S. Butterfield*, 292 N.L.R.B. No. 8 (Dec. 20, 1988), slip op. 7, 10-12 & n.10. Handbilling from the grassy strip did

[30] The relative ease with which the union secured such contacts with employees in the small community setting involved in *Babcock* stands in marked contrast. In that setting, it was feasible to visit at home, on the streets, and through phone calls. See 351 U.S. at 107 n.1, 113.

not constitute a reasonable alternative means of communicating the Union's message to petitioner's employees.[31]

e. Because advertising, home contacts, and handbilling from a public area adjacent to the parking lot could not provide the Union with "reasonably effective" means of communicating with petitioner's employees about self-organization, the Board reasonably concluded that "the Union's Section 7 right would be 'severely impaired—substantially "destroyed" within the meaning of *Babcock & Wilcox*' without entry onto [petitioner's] property." Pet. App. B6. In view of the relatively slight impairment of petitioner's property right that would result from granting access, *ibid.*, the Board properly found that petitioner's denial of access "interfere[d] with, restrain[ed], or coerce[d] employees" in violation of Section 8(a)(1) of the Act.

* * * *

The Board's *Jean Country* test is consistent with both the requirements of the Act and the holding of *NLRB* v. *Babcock & Wilcox Co.* It properly channels the Board's task of reconciling the tension between property rights and Section 7 rights. As applied in this case, the Board has fulfilled its mandate to ensure that neither right is impaired more than necessary.

[31] Petitioner speculates (Br. 24-25, 26) that the Union could have positioned its agents on the public portion of the grassy strip near the parking lot. But the four feet of the strip nearest the perimeter of the parking lot belonged to petitioner. Therefore, Union agents would have had to shout over traffic, and at some distance, to communicate with employees who parked closest to the strip.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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